IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2561 OF 2004

IN

SUIT NO.2554 OF 2004

Manoj Punjalal Patel ... Plaintiff.

vs.

Mohammedali Yusuf Shaikh & others. .... Defendants.

Mr.Bharat Joshi, for Plaintiff.

Mr.I.V.Rao, for Defendant no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 1st July,2005

P.C.:-

1. This is a Notice of Motion taken out by the plaintiff. The plaintiff has filed the suit basically for specific performance of the memorandum of understanding reached between the plaintiff and defendants. The memorandum of understanding between the plaintiff and defendant no.1 is dated 23.9.2002. By that memorandum of understanding, according to the plaintiff, the defendant no.1 had agreed to transfer the suit property to the plaintiff for consideration of

Rs.20,10,000/- (Rupees Twenty lakhs Ten thousand only). Out of that, an amount Rs.13,10,000/- (Rupees Thirteen lakhs Ten thousand only) was paid in cash on the date of memorandum of understanding i.e. on 23.9.2002 and the amount of Rs.2,00,000/- (Rupees Two lakhs only) was paid by cheque which is of the same date. According to the plaintiff, further the amount of Rs.5,00,000/- (Rupees Five lakhs only) was tendered on 27.2.2004, but the defendant no.1 did not accept the amount and did not deliver the possession. According to the plaintiff, therefore, a notice was issued to the defendant no.1 on 15th March,2004 wherein the facts were narrated and the defendant no.1 was called upon to hand over the possession after accepting the amount. The notice was replied by reply dated 24th March,2004 and the defendant no.1 in that reply denied the very existence of the agreement/memorandum of understanding. He also denied that he received the amount of Rs.13,10,000/- and Rs.2,00,000/- on 23rd September,2002. The plaintiff has filed this suit for a decree of specific performance and this notice of motion has been taken out basically for appointment of Receiver on the property. By ad-interim order dated 14th September,2004, the Court has appointed Receiver on the property and directed the Receiver to take formal possession of the property. The Court has also granted temporary injunction restraining defendants from dealing with the property and creating third party right till the Receiver takes formal possession.

2. The learned counsel for plaintiff submits that the defence that is put up by the defendants in reply filed in this Notice of Motion is that though he

admits execution of memorandum of understanding dated 23.9.2002 and he admits receipt of Rs.13,10,000/- and Rs.2,00,000/-, according to him page no.2 of the agreement is changed by the plaintiff. According to the plaintiff, the defendant no.1 admits his signature on the document. According to the plaintiff, the defendant no.1 has changed his version about the agreement from stage to stage. In the reply to the notice issued before instituting the suit, the defence of the defendant no.1 was that there is no such agreement in existence and he has also not received any amount. In the affidavit in reply he accepts that there was an agreement between the parties. He admits the receipt of Rs.13,10,000/- and Rs.2,00,000/- on 23.9.2002, but his defence is that the amount of consideration agreed between the parties was not Rs.20,10,000/- but it was Rs.1,02,00,000/- (Rupees One crore and two lakhs only), however, he did not state in that affidavit how that amount was to be paid and what were the terms agreed between the parties if the terms disclosed in Memorandum of Understanding at page 2 are not real terms agreed between the parties. In the further affidavit filed in this Court in this Notice of Motion, the defendant no.1 now has come up with the case that the agreed consideration was Rs.1,02,00,000/- and it was also agreed that the entire amount would be paid by 7.11.2002 and if the amount is not paid by 7.11.2002, the amount paid earlier will stand forfeited. According to the plaintiff, the defences put up by the defendants are afterthought and therefore, they should not be accepted. According to the defendant no.1, however there was an agreement between the parties, but the agreed consideration was Rs.1,02,00,000/-. According to the defendant no.1, it

cannot be believed that the property which is valued in excess of Rs.75 lakhs according to the Ready Reckoner, could be sold for Rs.20 lakhs. According to the defendant no.1 in the reply to the notice issued before the institution of the suit, the defendant no.1 has not denied the existence of the agreement, but according to him, the agreement of that date is denied and the terms which are in the notice are denied. It is further submitted that the plaintiff has manipulated the document and therefore, no reliance can be placed on that document. It was also submitted that today the defendant no.1 has taken out notice of motion seeking orders of this court for having the document examined and it was therefore, requested that hearing of this notice of motion should be postponed till that notice of motion is decided.

3. In the light of these rival submissions if the record is perused, following admitted facts are emerging :-

(i) There was an agreement for sale of the suit property between the plaintiff and defendant no.1 on 23.9.2002;

(ii) The defendant no.1 has admitted that he has signed the agreement.

(iii) On 23.9.2002 the defendant no.1 has admittedly received Rs.15,10,000/- (Rupees Fifteen lakhs and Ten thousand only).

4. The case of the defendant no.1 is that the agreement between the parties was for payment of Rs.1,02,00,000/- and that amount agreed to be paid on or before 7.11.2002. If one peruses the notice dated 15.3.2004 issued by the

plaintiff to defendant no.1 shows that the terms of the agreement according to the plaintiff, were clearly stated in the notice. It was also stated that the amount of Rs.13,10,000/- by cash and Rs.2 lakhs by cheque were paid on 23.9.2003 and the further amount was tendered by a bank draft dated 27.2.2004. This notice was replied by the defendant no.1. The defendant no.1 in paragraph no.2 of the reply dated 24.3.2004 stated thus:-

> "My client states, with reference to para no.1 of your notice, that there is no such agreement executed between your client and my client on 23.9.2003 and your client has cooked up stories. Further your client, has never made payment of Rs.13,10,000/- and Rs.2,00,000/- on 23.9.2003 as alleged by your client and put to strict proof the same."

In paragraph no.3, the defendant no.1 in clear terms stated that there is no agreement between the plaintiff and defendant no.1. The paragraph no.3 reads as under:-

> "My client further states that when no agreement existed between your client and my client, where's the question of rights arises, existed. Above all, your own statement made in para no.1 is self contradictory, as in one breath, you allege for the agreement (non-existence one) and in another breath allege, that my client demanded and your client agrees to pay, and lastly also, with the your notice, your have forwarded a xerox Pay order of Rs.5,00,000/- of DCB Bank, Lokhandwala Branch, No.005009 of

dated 27.2.2004, knowing every well, that the xerox Pay Order, can ever be encashed by the Banker, through my client."

Thus, the case of the defendant no.1 in this reply was that there is no agreement in existence between the parties, and there was no amount paid by the plaintiff to the defendant no.1. Then the defendant no.1 has filed affidavit in reply which is dated 30.11.2004. Perusal of paragraph no.3 shows that the defendant no.1 admits that on 23.9.2002 he and plaintiff agreed to enter into an agreement for sale of the property. Perusal of paragraph no.12 shows that the defendant no.1 also admits receipt of Rs.15,10,000/- on 23.9.2002. In this reply, the case of the defendant is that page nos.1 and 3 of the Memorandum of Understanding as produced by the plaintiff on the record of this court tally with the original Memorandum of Understanding, but page no.2 does not tally. Perusal of page no.2 of Memorandum of Understanding shows that page no.2 gives what is the amount of consideration agreed, on what dates the amounts have been paid and what is the agreed date on which the balance amount has to be paid. In the affidavit dated 30.11.2004 though the defendant no.1 claims that page no.2 has been changed and substituted, except saying that the agreed consideration was Rs.1,02,00,000/- out of which Rs.15,10,000/- has been paid as earnest money leaving balance of Rs.86,90,000/-, no details of terms are given. After the rejoinder is filed by the plaintiff, the further affidavit is filed by defendant no.1 dated 23.6.2005. Now details of terms which according to defendant no.1 were agreed upon, are given. According to defendant no.1, now the agreed

consideration was Rs.1,02,00,000/-, the amount Rs.15,10,000/- was paid on the date of agreement and the balance amount was to be paid by 7.11.2002 and it was also provided that if that amount is not paid by 7.11.2002, the amount of earnest money paid would be forfeited. One does not find any explanation in the affidavit dated 30.11.2004 why the stand different from one that was taken in that affidavit was taken in reply dated 27.3.2004. In the further affidavit dated 23.6.2005 of the defendant no.1, one does not find any explanation as to why details about the terms which are disclosed in that affidavit were missing from the first affidavit dated 30.11.2004. In my opinion, the stand taken about the agreement in the reply dated 27.3.2004 and in the replies filed in this Notice of Motion by defendant no.1 being inconsistent, the defendant no.1 was under a duty to explain why this contradictory stands were taken. On the basis of apparent contradictory stands taken by the defendant no.1 about the existence of the agreement, in my opinion, the prima facie defence put up by the defendant no.1 cannot be accepted as probable. The plaintiff has therefore, made out a prima facie case that there is existence of agreement for sale of the property with defendant no.1.

5. So far as the contention that in the Ready reckoner the value of the property is very high and as compared to that the amount of consideration is lesser, in my opinion, merely because of this aspect the agreement entered into between the parties does not become suspect document. In these circumstances therefore, in my opinion, the rights of the plaintiff deserves to be

protected and therefore, it will be appropriate to confirm the ad-interim order. The ad-interim order dated 14th September,2004 is therefore, confirmed subject to the condition that within a period of three weeks from today the plaintiff deposits in the Court amount of Rs.5,00,000/- (Rupees Five lakhs only) with due intimation to the defendants. The learned Counsel for defendant no.1 states that the defendant no.1 is not interested in withdrawing the amount. The Prothonotary and Senior Master of this Court to invest the said amount in fixed deposit in a nationalised bank during the pendency of the suit. Notice of Motion disposed of.